

## STATE OF NORTH DAKOTA

# GAME AND FISH DEPARTMENT

IN THE MATTER OF: )  
)  
The Hunting and Fishing Guide )  
Licenses of Timothy Boline )  
\_\_\_\_\_)  
The North Dakota Game and )  
Fish Department, )  
)  
)  
Complainant, )  
)  
vs. )  
)  
Timothy Boline, )  
)  
Respondent. )

**RECOMMENDED  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

On May 17, 2001, a Complaint was filed with the North Dakota Game and Fish Department (“Department”) by its director, Dean C. Hildebrand, requesting administrative action against Timothy Boline, a licensed fishing guide in North Dakota, license # 047823. The complaint alleges as grounds for administrative action violations of N.D. Admin. Code § 30-04-03-10(1) and (4), referring to convictions for violations of the state game and fish laws, and conduct detrimental to the image and professional integrity of the guiding and outfitting industry while carrying out the business of guiding or outfitting. The Complaint requests an order with administrative action as follows: (1) “[r]evoking Boline’s current fishing guide license;” (2) “[p]roviding ... authority to refuse to grant or renew Boline a fishing guide license for ten (10) years;” (3) “[a]llowing ... to refuse to grant or renew Boline’s hunting guide license for ten (10) years;” (4) “[r]equiring Boline to reimburse the ... Department for all costs of the investigation

pursuant to N.D.C.C. § 28-32-08(3);” (5) “[f]or such other and further relief as ... appropriate.” Boline filed an Answer on May 23, 2001.

On June 17, 2001, the Department requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to the Complaint. On June 20, 2001, the undersigned ALJ was designated.

On June 26, 2001, the ALJ issued a Notice of Prehearing Conference. The notice scheduled a telephone prehearing conference. The prehearing conference was held as scheduled. It was attended by counsel for the Department, Assistant Attorney General Matthew A. Sagsveen. It was also attended by counsel for Mr. Boline, Attorney Scott R. Thompson. The ALJ issued a letter prehearing conference summary and notice of hearing. At the prehearing conference counsel had agreed to dispose of the matter by filing of a stipulation of facts and either making closing argument or filing briefs. Mr. Thompson wanted a hearing for closing argument. Mr. Sagsveen wanted to file a brief. The ALJ allowed both. *See* ALJ’s July 28, 2001, letter, and July 10 and July 24, 2001, follow-up letters.

The hearing was held as scheduled on July 25, 2001, by telephone, originating from the ALJ’s office in Bismarck, North Dakota. Mr. Sagsveen represented the Department. Also present for the Department was Christie McCusker, who did not participate. The respondent, Mr. Boline, was present at the hearing and was represented by Mr. Thompson. The stipulation and supporting documents were provided to the ALJ prior to the hearing. One additional document was offered as evidence, a June 10, 2001, investigation report. At the hearing, upon objection of Mr. Thompson, the additional document was not admitted. No additional evidence was taken at the hearing.

At the hearing, the ALJ heard oral argument from Mr. Thompson and Mr. Sagsveen. He also heard a statement from Mr. Boline. Mr. Sagsveen asked for and was granted permission to file a supplemental post-hearing brief. He filed it on August 17, 2001. After the hearing and before he filed his post-hearing brief, Mr. Sagsveen filed a Motion to Exclude Evidence or, in the Alternative, to Offer Additional Evidence and for Continuance, with accompanying notice, brief, and affidavit. Mr. Thompson did not file a response to that motion. On August 9, 2001, the ALJ issued an Order Denying Motion.

Based solely on the evidence of the stipulation and supporting documentation and the oral arguments presented at the hearing and in the briefs of counsel, the administrative law judge makes the following recommended findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Timothy Boline is a licensed fishing guide in North Dakota, license # 047823. In 2000, Boline was licensed both as a fishing guide and a hunting guide in North Dakota. He has not applied for a hunting guide license in North Dakota for 2001.

2. The stipulation entered by the parties in this matter, dated July 11, 2001, is the factual basis for this decision, including the documentation sent to the ALJ along with the stipulation. Actually, a copy of the stipulation (signed just by Mr. Thompson) was faxed to the ALJ on July 11, 2001, along with the supporting documentation. The original stipulation was mailed to the ALJ on July 11, 2001, without the supporting documentation. At the hearing counsel agreed that the copy of the stipulation faxed to the ALJ with supporting documentation (provided by Mr. Thompson) is the sum total of the evidence in this matter. The ALJ has marked the original stipulation and cover letter with a blue exhibit sticker and the identification statement, "original stipulation" and will refer to it as Exhibit A. He has marked the faxed cover

and the copy of the stipulation and the supporting documentation with a blue sticker and the identification statement, “supporting documentation” and will refer to it as Exhibit B. Again, these two compilations of documents are the only evidence in this matter. The investigation report not admitted, with cover letter, is marked with a blue sticker and the identification statement “report not admitted” and will be referred to as Exhibit C.

3. The stipulation refers to many criminal reports and documents regarding Boline. Essentially, those reports and documents, all found as supporting documentation in Exhibit B, show the following:

- (a) Boline was convicted of a Class A misdemeanor, Possession of Drug Paraphernalia on March 15, 2001. Ramsey County Criminal Judgment and Commitment;
- (b) Boline was convicted of a Class B misdemeanor, Exceed the Limit of Walleyes, on March 15, 2001. Ramsey County Criminal Judgment and Commitment;
- (c) Boline was convicted of a Class B misdemeanor, Aiding in the Concealment of Unlawfully Taken Game, on March 15, 2001. Ramsey County Criminal Judgment and Commitment;
- (d) Boline was convicted of a Class A misdemeanor, Unlawful Delivery of Controlled Substance (Marijuana), on April 2, 2001. Benson County Criminal Judgment;
- (e) Boline was convicted of a Class B misdemeanor, Unlawful Possession/Transportation of Waterfowl, on April 2, 2001. Benson County Criminal Judgment.

4. All of the five criminal convictions above relate directly or indirectly to Boline providing fishing and hunting guide services to two Department undercover agents in September and October 2000. *See* six page Report of Investigation of Special Agent Gutknecht, and eight page Report of Investigation of Special Agent Gutknecht, Exhibit B. *See* also other reports and documents in the stipulation and supporting documentation, Exhibit B, particularly Department

Investigation Report dated September 15, 2000, and Department Investigation Report dated October 12, 2000.

5. Essentially, the five criminal convictions above show that Boline, as a guide, exceeded the limit of walleye for the three occupants of his boat by 7 during the first day of a guided fishing trip which began on September 13, 2000 (a total of 22 walleye were taken on September 13 by the boat). Boline also aided in the concealment of those walleye, hiding 15 walleye in a cooler on the shore, so that the exceeded limit would not be detected by a game warden when the boat was landed at a boat ramp, and picking up the concealed cooler of walleye later. On the second day of the guided fishing trip the boat with three occupants caught a total of eight walleye. On October 10 and 11, 2000, Boline as a guide engaged in the unlawful possession and transportation of waterfowl when he encouraged and allowed his hunting party to exceed the daily limit for waterfowl on both days of the hunting trip, and supervised or allowed to proceed the cleaning, tagging, and storing of the waterfowl in an improper fashion. Although a total of 25 or 26 ducks may have been taken by the two-person hunting party during that two day period, because the cleaning, tagging, and storing of this party's ducks and the ducks belonging to another hunting party were done in a haphazard and improper fashion, it is impossible to determine who ended up with what. Also in connection with the hunting trip in October 2000, *i.e.*, while engaged in the activities of the hunting trip, at the request of the Department's agents, Boline engaged in the activities that resulted in his two drug convictions. In essence, he obtained and sold or provided to the two agents small amounts of marijuana on two separate occasions.

6. N.D. Admin. Code ch. 30-04-03 contains the Department's rules on licensing of guides and outfitters. *See* N.D.C.C. § 20.1-02-05 (17). A hunting guide license or a fishing

guide license may be obtained individually, or the two may be obtained in combination. Any guide license is for a one-year period of time. A guide license is not automatically renewed, but a licensee may renew the license each year upon payment of a fee and otherwise meeting the requirements of the law.

7. N.D.C.C. § 20.2-02-05 (17) states, in part, as follows: “[the director shall]... adopt rules for the licensing of guides and outfitters... [t]he director may, after due hearing ..., revoke or refuse to renew the license of any person who violates the rules...”

8. N.D. Admin. Code § 30-04-03-10 states, in part, as follows:

[t]he license of any licensed guide or outfitter shall be subject to revocation or refusal to renew, ..., in addition to any other penalties prescribed by law or rule for a violation, when the licensed guide or outfitter: ... [i]s convicted of violating any game or fish law of the state ... [w]hile carrying out the business of guiding or outfitting, engages in conduct detrimental to the image and professional integrity of the guiding and outfitting industry.

9. These are the first violations of N.D.C.C. § 20.1-02-05(17) and N.D. Admin. Code § 30-04-03-10 alleged against Boline pursuant to which the Department has sought administrative action via a complaint. This is the first time the Department has sought to do what counsel agreed at the hearing amounts to a suspension of the privileges of a licensed hunting or fishing guide for a period of years pursuant to a complaint and hearing. Therefore, Department has no penalty matrix or guidelines for suspension of privileges from previous administrative actions.

10. N.D. C.C. § 28-32-08 allows an agency to assess the costs of an investigation to a person found to be in violation of a statute or rule as a result of an adjudicative proceeding or informal disposition. However, the total costs assessed and any civil penalty imposed may not exceed the statutorily authorized civil penalty for the violation. The Department has no statutorily authorized civil penalty for the violation of N.D. Admin. Code § 30-04-03-10.

## **CONCLUSIONS OF LAW**

1. Boline is a licensed fishing guide in the State of North Dakota, license # 047823. Boline's fishing guide license is subject to revocation or nonrenewal under the provisions of N.D.C.C. § 20.2-02-05(17) and N.D. Admin. Code § 30-04-03-10.

2. Boline has violated the provisions of N.D. Admin. Code § 30-04-03-10(1) and (4). Boline has three recent convictions relating to violations of the game or fish laws of the state of North Dakota, all three Class B misdemeanors. *See Findings of Fact Nos. 3 and 5.* Therefore, under N.D. Admin. Code § 30-04-03-10(1), Boline's fishing guide license may be revoked for any one or more of these violations. Further, Boline has two recent convictions relating to engaging in conduct detrimental to the image and professional integrity of the guiding and outfitting industry. Both are Class A misdemeanors involving drug violations of the law. *See Findings of Fact nos. 3 and 5.* Actually, the Class B misdemeanors probably fit under this category, too, but they more specifically fit under subsection (1). The facts clearly show that Boline's activity regarding drugs related to his hunting guide activity in 2000 and is conduct that is detrimental to the image and professional integrity of all hunting and fishing guides in North Dakota. Therefore, under N.D.C.C. Admin. Code § 30-04-03-10(4), Boline's fishing guide license may be revoked for any one or more of these violations.

3. Under N.D.C.C. § 20.2-02-05(17) and N.D. Admin. Code § 30-04-03-10, the director also has authority to refuse to renew a guide license for violations of N.D. Admin. Code § 30-04-03-10. Therefore, the same five violations that serve as a basis for revocation of Boline's current 2001 fishing guide license may serve as a basis for refusing to renew either Boline's fishing guide license or his hunting guide license, or both, in the future. In effect, a revocation of Boline's current fishing guide license and refusal to renew his fishing guide license

and his hunting guide license for a period of years amounts to suspension of his fishing and hunting guide privileges in North Dakota for a period of years.

4. There is no authority for the Department to impose on Boline reimbursement for the costs of the Department's investigation because the Department has no statutorily authorized civil penalty for violation of N.D. Admin. Code § 30-04-03-10. In other words, when there is no statutorily authorized limit on such an assessment no assessment can be imposed because the limit of such assessment is not known.

### **COMMENTARY**

There is no doubt about the violations or any question about the authority to impose the administrative penalties of revocation and refusal to renew. Counsel recognized this at the hearing. The only concern or question is how much penalty is appropriate under the circumstances. There is room for disagreement in this regard, and at the hearing the parties disagreed. The Department asks for revocation of Boline's fishing guide license and a suspension of both hunting and fishing guide privileges for a period of 10 years (refusal to renew). Boline says that a revocation of the one license and a suspension of the privileges of both licenses for a period of 18 months is more appropriate under the circumstances. Boline says that while the violations were serious, he has already been punished criminally for the violations. Further, Boline says that the violations were not so serious as to warrant 10 years of suspended privileges for both licenses, or for one combined license. The Department believes that the violations are very serious and that the administrative penalties requested fit the violations.

One concern with the Department wanting to impose these administrative penalties upon Boline is that these are Boline's first violations for which administrative action can be taken. Another concern is that the Department has not imposed such penalties before against anyone.



In the future, if another guide has violations of the same nature as Boline's three game related violations, but more egregious (*e.g.*, 14 walleye over the limit), but also has some other serious criminal conviction (*e.g.*, delivery of alcoholic beverages to a person under twenty-one, a Class A misdemeanor), would the Department impose a greater administrative penalty on the guide, *e.g.*, a penalty of suspension of privileges for more than 10 years, perhaps for 15 or 20 years?

The ALJ tends to agree with Boline that although the violations are serious, considering they are Boline's first violations and considering that it is not too difficult to imagine more serious violations or similar violations of a more egregious nature, ten years administrative penalty for what amounts to two relatively minor non-game and fish-related convictions, for which he was already criminally punished, even though it is conduct detrimental to the image and professional integrity of all hunting and fishing guides in North Dakota, and three game and fish-related convictions, which in relative terms also do not seem to be so egregious, seems to be too large a penalty.

A ten year suspension of privileges is five years beyond the five year limitation invoked under N.D.C.C. § 12.1-33-02.1, as an absolute five year limit for application of the *prima facie* evidence of sufficient rehabilitation rule for licenses of any "occupation, trade, or profession." Of course, the application of this statute is more complex than needs to be discussed in this decision, and the ALJ is not applying it in the context of hunting and fishing guide licenses, nor has he seen it so applied, but the statute does provide an interesting reference point.

The ALJ cannot help but wonder where the Department goes, in either direction, after the imposition of this rather large administrative penalty, assuming it stays with it in its final order.

Again, this is a first time violator, albeit a serious first time violator. Revocation of the current license is certainly warranted, as is substantial suspension of guide privileges, but the

requested penalty seems to be too harsh. Granted, the director apparently has discretion to refuse to renew a guide license even for 20 years, or for life, for violations of the law, even if criminal penalties have already been imposed, if he chooses to do so, but the question must be what is appropriate under the circumstances in a relative sense, looking to the past and the future. In this case, the ALJ does not believe ten years is appropriate.

Further, the ALJ believes that the Department needs to think about all the possibilities and devise a penalty matrix or guidelines for imposing penalties, and those guidelines should include heavier penalties for very serious violators and for repeat violators. However, in the absence of such guidelines and considering both the nature of these violations and the fact that they are Boline's first violations, the ALJ believes that the Department is requesting too much.

### **RECOMMENDED ORDER**

The greater weight of the evidence shows that Boline violated the provisions of law as indicated in the Findings of Fact and Conclusions of Law. As a result of the violations, it is ORDERED:

- (1) That Boline's current fishing guide license is revoked;
- (2) That if Boline commits no further violations of the game or fish laws of the state of North Dakota for a period of three (3) years and engages in no conduct that is detrimental to the image and professional integrity of all hunting and fishing guides in North Dakota for a period of three years, the Department will refuse to grant or renew Boline a fishing guide license in North Dakota for a period of three (3) years from the date of the Department's final order adopting this recommended order [*i.e.*, the Department imposes a suspension of Boline's fishing guide license privileges for a period of three years];

(3) That if Boline commits no further violations of the game or fish laws of the state of North Dakota for a period of three years and engages in no conduct that is detrimental to the image and professional integrity of all hunting and fishing guides in North Dakota for a period of three years, the Department will refuse to grant or renew Boline a hunting guide license in North Dakota for a period of three (3) years from the date of the Department's final order adopting this recommended order [*i.e.*, the Department imposes a suspension of Boline's hunting guide license privileges for a period of three years].

(4) That if Boline commits a violation of the game or fish laws of the state of North Dakota or engages in conduct that is detrimental to the image and professional integrity of all hunting and fishing guides in North Dakota within a period of three (3) years from the date of the Department's final order adopting this recommended order, the Department will impose an additional two-year suspension of Boline's fishing guide license privileges or hunting guide license privileges, or both, for these five violations, and may impose further suspension of privileges as appropriate relating to the new violations or conduct.

Dated at Bismarck, North Dakota, this 22nd day of August, 2001.

State of North Dakota  
Game and Fish Department

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